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Property, Territory, and Colonialism: A legal history of enclosure.

Dr Henry Jones*

‘this history ... is written in the annals of mankind in letters of blood and fire’

– Karl Marx, Capital Volume I

Abstract

This article is concerned with how law organises and controls space. It offers a new history of enclosure in the context of early English colonialism. By drawing this connection, the article opens up new lines of enquiry into how law organises and produces space at both the domestic and international scale.

1. Introduction

On 5th August 1583 Sir Humphrey Gilbert landed at St John’s Harbour, Newfoundland. He had in his possession two magical documents. The first was a navigation chart prepared by the Queen’s astrologer, the Grand Magus, John Dee. Dee was widely regarded as the most learned man in England at the time; possessing a personal library which was the largest in the Kingdom. His navigation chart led Gilbert to Newfoundland, while Dee himself remained in London with his scrying stones, talking to angels and trying to turn lead into gold. It was the

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second document which Gilbert possessed which had the real alchemical powers; a royal charter from Queen Elizabeth granting him ‘all the soil of all such lands, countries and territories so to be discovered ... with full power to dispose thereof, and of every part thereof in fee simple or otherwise, according to the order of the Laws of England’.¹ This grant of fee simple ownership allowed Gilbert to transform unowned land into private property. One simple ritual was required to complete the transformation – the surveying of the land. Gilbert’s tiny fleet of 4 ships included several surveyors, who immediately began to measure and map the area. Gilbert went down with his ship on the return voyage, but the colony survived and expanded, and was followed by many other English colonies in the next century. Here, with Gilbert at the end of the 16th century, the emerging practices of private property and colonial territory are seen as one and the same.²

This article is concerned with the history of the legal creation of private property; specifically English practices of private property, developed in the colonisation of Ireland and North America. It is in this colonial setting that practices of private property were worked out which were then brought back to the metropole. I argue that this practice of private property was at once a practice of territory, and the connection of the two is vital in the formation of the modern state. By making this connection between enclosure and private property in England and territory and private property in the colonies, this article provides a new basis to understand the connections between the domestic and international legal production and organisation of space.

¹ David Quinn et al. *New American World: A Documentary History of North America to 1612* (New York: Arno Press, volume III, 1979) pp 267-8.

² A first-hand account of the Newfoundland expedition is found in Edward Hayes, ‘Sir Humphry Gilbert’s Voyage to Newfoundland’, originally published as part of Richard Hakluyt, *The Principal Navigations, Voyages and Discoveries of the English Nation* (1589) and available online at www.gutenberg.org/ebooks/3338.

Legal theory is undergoing a ‘spatial turn’, meaning paying more attention to how law is involved in situating people and things in space, how law has concrete, material origins and effects.³ Meanwhile international lawyers have had a turn of their own, but a turn to history which has been hugely productive in illuminating and unsettling many central ideas of international law.⁴ In this article I will bring these ‘turns’ together; a spatial history of territory in land based practices of property. This history builds upon various existing histories of enclosure, primarily those from the Marxist historical tradition.⁵ This history is revolutionary in its intent, as Ellen Meiksins Wood explains: ‘Thinking about future alternatives to capitalism requires us to think about alternative conceptions of its past’.⁶ In the same way, the history of property might seem an arcane interest, but it is a vital one to understand the limits of the present, and the possibility for a different future for property, territory, and international law.

This article is about the creation of private property in the practices of English colonialism. I put the history of enclosure into the context of colonialism, and focus on the development of legal techniques in this colonial context that then travel back to the metropole. Private property is a central legal technique for ordering space, controlling actions within that space,

³ See for example: N Graham, *Landscape* (London: Routledge, 2010); A Philippopoulos-Mihalopoulos, *Spatial Justice* (London: Routledge, 2014); S Keenan, *Subversive Property* (London: Routledge, 2015) O Barr, *Jurisprudence of Movement* (London: Routledge, 2016) and the special issue 7(2) *Law, Culture and the Humanities* (2011). This work makes a distinctive legal theory contribution over and above the longer standing work of legal geography. For a recent statement of this field see I Braverman et al, *The Expanding Spaces of Law* (Redwood CA: Stanford Law Books, 2014)

⁴ Martti Koskenniemi’s *The Gentle Civilizer of Nations* (Cambridge: CUP, 2001) inaugurated the turn to history as method in international law, but see also G.R.B. Galindo ‘Martti Koskenniemi and the Historiographical Turn in International Law’ (2005) 16 *European Journal of International Law* 539; A Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2008); M Craven, M Fitzmaurice, and M Vogiatzi (eds) *Time, History and International Law* (Leiden: Martinus Nijhoff Publishers, 2007); B Fassbender and A Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012); and for a recent critical reflection on the turn to history see A Orford ‘International Law and the Limits of History’ in W Werner, A Galán, and M de Hoon (eds) *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: CUP, 2017).

⁵ EM Wood, *The Origin of Capitalism: A Longer View* (London: Verso, 2002) is the leading account of the transition debate, offering both summaries of academic positions and a powerful and original argument.

⁶ *Ibid*, at 8.

and ultimately shaping the subjectivity of the people in those spaces. I argue that the techniques of land abstraction at the root of private property in land were developed in colonial practice. Colonialism was a necessary condition for enclosure. In the first section I outline the prevailing history of enclosure and private property, arguing that there is a lack both of legal history and of colonial history. In the second section I trace the development of private property and territory to the English colonisation of North America, the surveying of Ireland, and the enclosure of the English commons. In conclusion I explain the relevance of this history for contemporary legal theory at both the domestic and international scale.

2. Turning Land into Property

The history of enclosure is dominated by the Marxist tradition of historiography, told as a story of dispossession, vital but often prior to the institution of capitalism. In his book *The Great Transformation*, Karl Polanyi admits that the history of the enclosures ‘may at first seem a remote subject’ from the history of the industrial revolution.⁷ However, it is important to understand not just the origins of industrialisation, but the origins of capitalism as a whole. In volume 1 of *Capital*, “Part Eight: So-called Primitive Accumulation”, Marx looks for capitalism’s point of departure.⁸ To turn property and money into capital requires ‘divorcing the producer from the means of production’ – i.e. turning the subsistence farming serf or peasant into a free wage labourer.⁹ Polanyi accepts that these changes brought benefits – huge increases in the production of food as well as economic gains both in terms of the value of the land and rising real wages. However, to view benefit in these economic terms is to reduce the

⁷ K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon, 2001) at 38.

⁸ K Marx, *Capital Volume I* (London: Penguin Classics, 1990) at 871.

⁹ *Ibid*, at 875.

question and to miss the ‘infinite harm’ and ‘destruction of the fabric of society’ wrought by enclosure and dispossession.¹⁰

Marx located the origin of capitalism in the English countryside, and Ellen Meiksins Wood has added significant historical weight to this claim.¹¹ This is a long and complex debate in both Marxist and other historiography, outlined in Wood’s book, but the key point of context for my argument is this: property relations in England were such that landlords extracted income from tenants through purely economic means, creating a social property relationship that is fundamental to capitalism. The material basis for this Wood finds in relatively large landholdings, relatively better infrastructure, and a more centralised state with a single dominant national market emerging in London. The relationship of landlord, tenant and wage labourer, extended by enclosure, buttressed with the culture of improvement, gave rise to an extremely productive agriculture which could support a large population not directly engaged in agriculture, and therefore a large wage-labour force and a large domestic market for cheap consumer goods.¹²

Wood insists on the origin of capitalism in the English countryside, with English colonialism playing a later and more supplementary role. Marx also in his brief remarks on colonialism treats it as secondary. Instead I want to insist on colonialism as a simultaneous development with capitalism, colonies and enclosures, territory and property.¹³ This is a connection that political theorist Onur Ulas Ince makes particularly clear, arguing that ‘capitalism ...appears

¹⁰ Polanyi, above n 7, pp 40-1.

¹¹ Wood, above n 5.

¹² Ibid, particularly chapter 5 ‘The Agrarian Origin of Capitalism’.

¹³ Colonialism is a specific form of imperialism, which did more than simply extract wealth from conquered places, but restructured economies and joined them into a market with the imperial centre. It is the formal structures of political and legal rule which, after they are removed, differentiate colonialism from an ongoing imperialism. See further e.g. A Loomba, *Colonialism/Postcolonialism* (London: Routledge, 2005).

as a historical formation that has emerged in and through colonial networks'.¹⁴ It is also a connection supported by the historical record. Colonialism was a necessary condition to make capitalism possible, first for the obvious extraction of huge surpluses of raw materials, but more importantly for the opportunity to experiment with new forms of social and property relations for the production of profit, including slavery and genocide, which could not be practiced in Europe. Ultimately, colonialism was vital to expand the market and give new opportunities for investment and economic enterprise. As Ince argues, if capitalism and colonialism are co-constitutive, then the practice which connects the colony with the metropole is primitive accumulation, and the practices of colonialism and enclosure are directly connected.¹⁵

Colonialism and enclosure were both legal endeavours. The transition from feudalism to capitalism is also a legal transition. To enlarge and consolidate land holdings, and to simplify land use, all vital for the improvement of the land, required a change in the law. Land had to be free from customs and rights which interfered in this most productive use. Land had to become *property*. This transition, and this legal change, did not happen quickly or easily. This is Marx's history written in 'blood and fire'.¹⁶ It would require the dispossession of many English peasants, but much more brutally was the colonial experimentation in Ireland and North America. Here English landlords were able to impose their new versions of land as property and experiment with improvement.

If histories of enclosure are generally ignorant of law, legal histories of enclosure tend to be too local in their focus. For example Alain Pottage's important and influential article 'The

¹⁴ Onur Ulas Ince, 'Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention', (2014) 79 *Rural Sociology* 108. See also Onur Ulas Ince, *Colonial Capitalism and the Dilemmas of Liberalism: Economy and Ideology in Imperial Britain* (Oxford: OUP, forthcoming).

¹⁵ Ibid, pp 110-4.

¹⁶ Marx, above n 8.

Measure of Land' traces the history of land ownership from mediaeval ritual to 20th century registration, arguing that there is a long history of the 'reduction of land to paper'.¹⁷ The vital contribution of Pottage is to also build upon the history of enclosure but to add a rigorous history of actual legal practice. The article pushes the achievement of this reduction of proof of ownership to simply paper proof forward from early surveying and enclosure of estates in the 17th century to the late 19th century, after the majority of enclosure had happened and into land registration.

His argument starts with the importance of local memory for identifying property in land, something which is still found in the historical record of both the 1850 Ordinance Survey and the 1870 Commission on the Operation of the Land Transfer Act.¹⁸ As trust in maps grew this local knowledge could to some extent be codified into the representative document. Pottage also looks at how the actual practice of conveyancing survived for a long time without estate maps, and that special contracts with verbal descriptions of the identity of property served conveyancing perfectly well in practice. As a result certainty over title was sacrificed to facilitate exchange and 'the logic of property was subordinated to a logic of contract'.¹⁹

The map, and the cartographic way of seeing land, first gained authority in large estates, as landlords used this method to both see the extent of their land and to better organise it. A calculative and rational aesthetic changed the way that land was understood over the 18th century. However, for conveyancing, these maps could not take over from older forms of identifying property by inspection. An estate map would not reveal the relationship with neighbouring estates and ordinance survey maps could not be relied upon to give the detail needed for property. It was not until the late 19th century that ultimately the contract and the

¹⁷ A Pottage, "The Measure of Land", (1994) 57 *Modern Law Review* 363.

¹⁸ *Ibid*, pp 364-5.

¹⁹ *Ibid*, at 370.

map could be combined in the register and that land was truly reduced to paper. Pottage demonstrates that what is needed is not just the formalisation of ownership away from the local market, but also the reproduction of land on paper through mapping and surveying. Only when both of these practices are developed by the end of the 19th century is land registration made possible. What is missing, and what I will focus upon in the history herein, is that these forms of practice had been developed much earlier in English colonies.

Even the move to registration in the second half of the 19th century has an important colonial context. Brenna Bhandar demonstrates that registration of land was pioneered in the colony of South Australia. While the drive to make land as fungible as possible for the interests of capital goes back much further, Bhandar focuses on the development of the Torrens system of title by registration. The colony, established by Act of Parliament in 1834 and administered by the South Australia Company, was a ‘grand experiment in the art of colonization ... among which industry would be wholly unfettered either by restrictions on trade, by monopolies or by taxation’.²⁰ A utilitarian experiment, involving Bentham himself in its planning, South Australia represents the culmination of centuries of English and British colonisation.²¹ The surveying and planning of South Australia by William Light used a regular geometric grid, to divide the land in the abstract into purchasable blocks. Adelaide and Melbourne were both planned in this way before they were settled, and the blocks of land were sold before they were even cleared.²²

²⁰ D Pike, ‘The Utopian Dreams of Adelaide’s Founders’, as quoted in P Carter, *The Road to Botany Bay* (New York: Knopf, 1988) at 202.

²¹ P Carter, *The Road to Botany Bay* (New York: Knopf, 1988) at 202.

²² *Ibid*, pp 211-4.

Robert Torrens was elected to the Parliament of South Australia in 1857, and become the third premier of South Australia that same year.²³ In 1858 *The Real Property Act* came into force and introduced the Torrens System of title by registration. Bhandar demonstrates that Torrens in part modelled his system on the registration of ships, which he was familiar with from working as a Custom's Officer in the Port of Adelaide. The ship, understood as it was in the 19th century as a part of the territory of the flag State, was a useful model for title by registration. The Torrens System spread through British colonies, being adopted next in the colonies of Vancouver Island and British Colombia, and notably imposed upon British Mandated Palestine.

Bhandar's argument focuses on abstraction; abstraction both commodifies and racializes in the settler colony. Abstraction turns land into fungible property, commodifies it, but also renders the land vacant by racializing the land holding of the indigenous people abstracted into savages. This same process can be seen in the earlier colonisation of Ireland and North America, with the natives of these lands racialized as nomadic, subsistence users of the land, wasting the potential of the land. It is a core part of Bhandar's broader work that the abstraction involved in creating private property and also the racial emerge together. Private property comes into existence alongside the savage native who is to be dispossessed.²⁴ Bhandar ends her account by asking how this experimentation in the colonies fed back into English property law. It was in particular the concept of waste which was most potent for the redevelopment and extinguishing of common land and peasant rights.²⁵ This wrongfulness of wasting was foundational to much political economy from John Locke onwards, and is the

²³ B Bhandar, 'Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony' (2015) 42 *Journal of Law and Society* 257.

²⁴ On the connection of law, property and race, see B Bhandar 'Property, Law, and Race: modes of abstraction', (2014) 4 *UC Irvine Law Review* 203.

²⁵ Bhandar, above n 23.

object of the ‘culture of improvement’.²⁶ Waste had held a common law meaning in relation to preserving the land and its boundaries, but this concept could again be changed in the colonies where waste instead demanded enclosure, and this in turn fed back into the development of the common law.²⁷

Title by registration is the culmination of this process of abstraction of land into property. Land ownership was defined initially and historically in English land law by relationships of use.²⁸ These relationships with the actual land are messy and complicated, hindering the exploitation of land as a commodity. To turn land into a commodity required its abstraction into a simple unit of property, easily exchanged. Registration allows this, but as Pottage described, the processes of abstraction have a much longer history in practices of measuring, surveying and mapping. Bhandar demonstrates very clearly that importance of colonialism for facilitating this abstraction – the colony was a legal blank slate, with the doctrine of *terra nullius* allowing for experimentation with legal forms of land ownership. These practices of abstraction though are embedded in English colonialism from its very beginning, and the development of both English colonialism and land as property are best understood together.

²⁶ This is waste as a concept running throughout the enclosure movement, rather than just the specific category of waste in land law. For more on waste see: M Neocleous, ‘War on Waste: Law, Original Accumulation, and the Violence of Capital’ (2012) 75 *Science & Society* 506-528; Z Bauman, *Modernity and Ambivalence*, Chapter 1 (Cambridge: Polity Press, 1991).

²⁷ For a survey of this history, with an American focus, see J Fraley, ‘A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas about the Transformation of Law’, *Washington & Lee Legal Studies Paper No. 2015* (October 2015).

²⁸ Pottage, above n 17. See also J H Baker, *An Introduction to English Legal History* (Oxford: OUP, 2007) chapter 13 for discussion of feudal ownership, and for example the first part of Coke’s *Institutes*, E Coke, *Coke on Littleton* (London: Saunders & Benning, 1830) which repeatedly stresses that use of land rather than ownership.

3. Turning Land into Territory

In international legal history colonialism has received plenty of close historical study, particularly from critical and Third World scholars.²⁹ However, this history has its own shortcomings in a lack of attention to property. Where questions of land and property do come in it is often as a question of territory, more focused on the extension of political control and jurisdiction than the actual ownership of the land. For example, neither the *Oxford Handbook on the History of International Law* or the history sections of the *Oxford Handbook on the Theory of International Law* consider property law and its use as a tool of early colonisation. Martti Koskenniemi has recently gestured towards the importance of understanding the history of property law for the history of international law, describing private property and territorial sovereignty as ‘the yin and yang of global power’.³⁰ This direct connection between private property and territorial sovereignty can most clearly be seen in the earliest establishment of these two legal systems for ordering the material world. The abstraction of land away from relationships of use and into absolute ownership as property that is achieved by registration in the 19th century has a history in the techniques of abstraction not just in England but in English colonialism.

The leading study of the history of territory is Stuart Elden’s *The Birth of Territory*. This work offers an excellent genealogy of territory, which Elden describes as more than ‘a bounded space under the control of a group of people, usually a state’, it is actually ‘a bundle of political technologies’, concerned with, amongst other things, the measuring of land and

²⁹ Key works include: A Anghie, *Imperialism, Sovereignty and the making of International Law* (Cambridge: CUP 2007); M Craven, *The Decolonisation of International Law* (Oxford: OUP, 2007); A Orford, *International Authority and the Responsibility to Protect* (Cambridge: CUP 2011); S Pahuja, *Decolonising International Law* (Cambridge: CUP, 2011); see also B Fassbender and A Peters (eds) *Oxford Handbook of the History of International Law* (Oxford: OUP, 2012).

³⁰ Martti Koskenniemi, ‘Expanding Histories of International Law’ (2016) *American Journal of Legal History* 104.

the control of terrain.³¹ This combination of measurement and control is fundamental to the modern state. As an analytical tool, Elden's history of the concept of territory encourages us to think of territory as what states do prove their existence. The modern state imposes its measurement and control upon a defined area of land, to delimit the space which is the state. In this way state and space are imminently connected.

The historical account of the birth of territory takes the modern usage of territory as representing an historically specific understanding of the relationship between politics, power and place. Elden starts with ancient Greek ideas of the link between, a city state, its ruler, and the very soil on which it was built to render the polis as simultaneously a place and the people who inhabit it. In Roman thought Elden finds military concerns with terrain and land surveying as a military technique. This is a clear spatial understanding of power, but of military power and of strict borders and limits.

As the history proceeds through the middle ages, feudalism is discussed for its understanding of the direct connection between King and land, and of land as a source of power. The glossators of Roman law also understood land as a source of political power, and connected it to sovereigns rather than individual owners, keeping land and property separate. With the Reformation and the discovery and conquest of the New World political power begins to be conceptually separated from land. The combination of the fragmenting of the Church and break down of the Holy Roman Empire with the anticipation of massive empty lands to be conquered began to lead thinking about sovereignty away from land. Finally, it is only with early modern thinkers such as Hobbes, Locke, or most crucially for Elden Leibniz, that territory as a concept denoting the spatial and political extent of a sovereign state was born.

³¹ S Elden *The Birth of Territory* (Chicago: University of Chicago Press 2012) at 322.

This conceptual shift also allows for land to be thought of as property rather than as connected to political authority.

Although law is discussed, Elden's work overall lacks a consideration of law amongst the political technologies which make up territory. His argument places the development of practices and theories of measurement as forms of political control maturing in the mid-18th century as the birth of territory. It includes some consideration of the development of these techniques for colonialism, particularly colonial map making, but does not look at the actual establishment and administration of the colonies. When we do look at the colonies themselves we see property and territorial practices as simultaneous. As such, *property* is the missing legal practice from the account of territory. An historical account of the emergence of property in land, as elaborated above, also sees this as a combination of measuring and control to produce the abstraction of land into property. The same process produces the abstraction of land into territory.

Nick Blomley, in responding to Elden's work on the history of territory, has connected this thinking about territory back to property.³² Blomley argues that because territory is viewed through the lens of the state, and property the individual, the territorial dimensions of property are missed. A state's territory is not only constituted internationally, but also domestically. Territoriality, those technologies with which a state demonstrates its existence, operates internally as well as externally. Property, if we insert it into this matrix of political technologies, is the technology most explicitly connected to control over the land and organisation of people on the land. Property has many meanings,³³ and it is traditional and

³² Nicholas Blomley, 'The Territory of Property Law' (2015) *Progress in Human Geography* 3.

³³ See M Davies, *Property* (London: Routledge, 2007).

correct to assert in a lawyerly fashion that property is not things, but rights.³⁴ And yet private property, Blackstone's 'sole and despotic dominium'³⁵ is so strongly spatial that it is common to think of the thing, or the territory, itself as the property. Property provides the grammar for the organisation of many aspects of social and political life. Most crucially here, property assigns resources to owners whilst also organising citizenship and social belonging.

Blomley describes territory and property as 'relational effects',³⁶ producing and organising an 'economy of objects and places'.³⁷ Property is territorialised, and this has certain effects, particularly of classification and communication. Property gives specific rights over specific objects or places, but territory allows for the ownership of everything within an area, it classifies all that is within the territory as owned, whether by an individual, a company, or a state. It is also communicative, most particularly again in the form of a fence or boundary. These practices of communicating ownership are seen both in states claiming territory and individuals protecting property. For Blomley, 'property and the state are intimately related'.³⁸ Property relies on the state for recognition and formalisation, that much is obvious. Private property relies upon delegated power on the part of the state.³⁹ The enforcement of property, through adjudication, registration etc., relies upon the state. But the state also has a long standing interest in knowing and understanding property for purposes of taxation and other problems of demographics.

³⁴ The de-thingification of property, and the bundle of rights concept of property, was a project of American legal realism, see W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710; M Radin, 'A Restatement of Hohfeld', (1938) 51 *Harvard Law Review* 1141; a good summary of and response to this tradition can be found in H E Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691. For a history of this legal development as connected to capitalism's need of a more complex and abstract account of property, see K J Vandavelde, 'The New Property of the Nineteenth Century' (1980) *Buffalo Law Review* 325.

³⁵ William Blackstone, *Commentaries on the Laws of England* Book 2 (Liberty Fund 2011) at 2.

³⁶ Blomley, above n 32, at 4.

³⁷ Brighenti, above n 29 at 75.

³⁸ Blomley, above n 32, at 3.

³⁹ See G A Cohen, *Self-Ownership, Freedom, Equality* (Cambridge: CUP, 1995).

These relationships between property and things, and people and place, are a major theme of Nicole Graham's *Landscape*.⁴⁰ Graham argues that in the transition from feudalism to capitalism, land changed from being the source of power, to an object of power, it became a thing, a commodity, capital. Law changed too, from a quasi-feudal system of fealties, rights and duties closely related to the nature of the land, how it was owned and used, to an abstract system of absolute rights. As Jeremy Bentham noted, the 'thing' of property was elided, and what remained was the right.⁴¹ These individual rights separate not just property from place, but individuals from community. Private property alienates, as observed by Hegel, Marx, Freud and others; it separates humanity from nature. This is the conceptual failing of property; it does not account for actual material relations. Even worse, property law does not just fail to explain people's relationship with nature; private property has created a world where we struggle to sustain human life.⁴² This gap between abstract law and material existence is a problem then of both territory and property.

Property and territory are both historically produced practices for ordering space. They operate from different ends of a sovereignty spectrum, but both make visible how political and economic power is ordered and organised. To understand the limits of these practices, it is necessary to understand their historic contingency. The rest of this article turns to that history, both in England and its colonies, in the broad context of the transition from feudalism to capitalism.

⁴⁰ Graham, above n 3.

⁴¹ J Bentham, *An Introduction to the Principles of Morals and Legislation* as discussed in CB Macpherson, 'Capitalism and the changing concept of property' in E Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (Edward Arnold 1975).

⁴² On the conflict between property law and environmentalism, particularly in the US context, see: E Freyfogle, *A Good that Transcends* (Chicago: University of Chicago Press, 2017).

4. The Creation of Property and Territory

Enclosure is usually understood as having its creative birth in the second half of the 15th century, with the combination of population growth, technological improvement, inflation, the rise in wool prices, social upheaval, and Protestantism.⁴³ The enclosure of the English commons begins in the 15th century, and is already enough of a concern to the aristocracy in 1489 for Henry VII to pass the first anti-enclosure act.⁴⁴ This was re-enacted in 1516, then 12 more times over the next 150 years, and commissions of enquiry into enclosure were established in 1517, 1548, 1565, and again in 1607. As Polanyi notes, the frequency of legislation is seen by some as evidence of how unstoppable enclosure was, although his own account is very sympathetic to the struggles of the aristocracy, and their ‘commitment to the welfare of the commonalty’.⁴⁵ The other side of the legislation in this period should be noted; it is over this period that increasingly brutal laws against vagrancy and begging appear, including the introduction of branding.⁴⁶ Both facts attest to the disruption caused by changing the legal status of land.

Enclosure required a change in how lawyers understood property and land. Conceptually, David Seipp reports that the Yearbooks do not show the use of the term property to mean land until the early 16th century, and emphasises the importance of Christopher St. German’s *Doctor and Student* for setting out the idea of land as property.⁴⁷ Before 1490 lawyers ‘did not apply the word “property” to land because land was different’.⁴⁸ Land was different for theoretical and practical reasons. In theory, land was held for a feudal lord, and could not be

⁴³ Essential histories on this period include C Hill, *The English Revolution 1640* (London: Lawrence and Wishart, 1940); F Braudel *Civilisation and Capitalism* (volume 1, London: Collins, 1981), and Joan Thirsk (ed) *The Agrarian History of England* (volume 3, Cambridge: CUP, 1967).

⁴⁴ J Thirsk, *Rural Economy of England* (London: Bloomsbury, 2003) 72.

⁴⁵ Polanyi, above n 7, pp 39-41.

⁴⁶ Marx, above n 8, at 896.

⁴⁷ D Seipp, ‘The Concept of Property in the Early Common Law’ (1994) *Law and History Review* 29.

⁴⁸ *Ibid*, at 86.

devised by will.⁴⁹ In practice, land can sustain many overlapping claims by many individuals, and be used casually or regularly by many others. Rights to land could be held by many without excluding anyone. The yearbooks are filled with detailed descriptions and disagreements about the multiple estates, tenures, and customary arrangements. Those things termed property were much simpler. Property was held by one person and ‘excluded all relations with other persons’.⁵⁰ For the simpler and more abstract terminology of property to take over the complexity of land holding needed a change in how land was conceptualised. This change in terms ‘invoked a stark mental image of one solitary person alone in complete and exclusive possession of one tract of land’.⁵¹

Meanwhile at the international scale the end of the 15th century also saw the beginning of a change in the understanding of sovereign territory. The 1494 Treaty of Tordesillas, between the crowns of Castile and Aragon (Spain) and Portugal, agreed a line of longitude 370 leagues west of the Cape Verde Islands, dividing the two spheres. To the west Spain had influence, and the right to claim any newly discovered lands; to the east Portugal had this right. Whilst not a territorial claim in itself, Elden explains that this change represented a first attempt to establish claims to territory by calculation and measurement rather than discovery and occupation.⁵² The former Portuguese colony roughly equivalent to Brazil was claimed exactly by discovering that the line hit the land at this point.

Back in England, the enclosure movement required a change not just in who owned the land, but how land was owned. St German’s *Doctor and Student* was a work written in English which involved a series of hypothetical debates between a doctor of religion and a student of

⁴⁹ In theory, because the practice leading up to the conceptual shifting of land into property is filled with examples which don’t fit the theory.

⁵⁰ Seipp, above n 47, at 87.

⁵¹ Ibid. See more generally A MacFarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford: Blackwell, 1978).

⁵² Elden, above n 31.

the common law. Published in 1530, the work became a standard primer for young lawyers, providing background on the common law and broad generalisations with which to structure legal arguments. It glosses the subject, offering neat divisions of different areas.⁵³ Under ‘the first ground of the law of England’, Reason, are a primary and secondary law of reason. The primary is the person, so murder and other such crimes against the person. The second is property, both moveable and immovable. Here for the first time in the record of English legal history land is equated with property, rather than treated as a special case. Even so, it takes a while for this to become standard. Coke’s *Reports*, published from 1600 – 1615, treat property in goods separate to ownership of land. Coke’s *Institutes*, from 1628, use the terms more interchangeably, and generalise land and goods as property.⁵⁴ Similarly practice changes through the 17th century, with law reports finding property in trees, crops, and wild animals.⁵⁵ Legislative change followed the change in common law, 1660 saw the *Tenures Abolition Act*, and the new government of landlords ensconced by the Restoration passed no anti-enclosure legislation.

Before these changes during the interregnum and the Restoration, it is important to look more closely at English colonialism in the Elizabethan period. John Dee, who helped Gilbert plan his voyage to America, was a key figure in the early years of English imperialism. He provided maps and instructions to Francis Drake, Martin Frobisher, Walter Raleigh and Gilbert. He is generally accepted to have brought the term “British Empire” into common usage. Dee is perhaps dismissed because he was an alchemist, who talked to angels. But he was a polymath, with the largest personal library in England, and clearly had excellent knowledge and understanding of navigation and map making, producing usable maps for explorers. He also wrote extensive arguments promoting the idea of an English overseas

⁵³ Seipp, above n 47.

⁵⁴ Ibid, pp 80-1.

⁵⁵ Ibid, pp 84-5.

empire and defending the legitimacy of English claims. Whilst the works of the younger Richard Hakluyt are usually regarded as the most important defence of early English imperialism, as Ken MacMillan has argued, it was Dee who actually had influence on royal policy.⁵⁶ His most important work in this respect is *The Limits of the British Empire*, which is made up of manuscripts presented at the court of Elizabeth I.⁵⁷ This work includes historical, legal and geographical arguments advocating for and defending English settlement of the new world.

The first two parts of the *Limits* are largely geographical arguments in which Dee sets out his understanding of the geography of the North Atlantic, and also argues that his geography is superior to any other, for example Gerard Mercator, who Dee knew and corresponded with. This argument is based in discovery, claiming that he has mapped parts of the new world unknown to the Spanish, and therefore not susceptible to their claim. In the third part of *Limits*, Dee gives his strongest legal arguments, and bases them in history. He starts with the Brut history begun by Geoffrey of Monmouth, whose 12th century *History of the Kings of Britain* recounts the story, found in an “ancient Welsh book” consulted by Geoffrey, of the Trojan soldier Brutus, who founded an empire called Britain after the Trojan war. His descendant, King Arthur, then conquered lands in the North Atlantic and Scandinavia. The Tudors were supposedly the return of these British monarchs who had been ousted by the Saxons. Dee used these historical accounts liberally as the basis for a new re-establishment of the British Empire, including claims that Arthur had conquered Greenland, Saint Brendan had

⁵⁶ K MacMillan, *Sovereignty and Possession in the English New World* (Cambridge: CUP, 2006).

⁵⁷ John Dee, *The Limits of the British Empire* (New York: Praeger, Ken MacMillan ed, 2004).

discovered Bermuda, and the Welsh Prince Lord Madoc had planted a colony in Florida in around 1170.⁵⁸

Dee's legal argument draws largely on Roman law, emphasising passages from Justinian's *Digest* which require inhabitation for possession, more than mere discovery. This historical discovery was part of the process, but it needed occupation to complete the ownership. Thus the urgency for Elizabeth to grant charters for the exploration and settlement of North America before the Spanish or anyone else got there. In Dee's words 'this recovery and discovery enterprise is speedily and carefully to be taken in hand'.⁵⁹ This roman law argument is followed with reference to the 'ancient laws of England', Lambarde's *Archaionomia* from the reign of Edward the Confessor, and canon law, with references to the duty of 'Christian princes' to 'spread abroad the heavenly tidings of the gospel among the heathen'.⁶⁰ Together, Dee concludes, 'partly *Iure Gentium*...partly *Iure Civilis*...partly *Iure Divino*' combine to justify England's possession of lands discovered and occupied by England.⁶¹

Dee's arguments in the third section of *Limits* were presented to Elizabeth weeks before Frobisher's third voyage and about a month before Gilbert was granted his patent in 1578.⁶² Before his interest had turned to North America, Gilbert had been heavily involved in the plantations of Ireland. He served as military Governor in both Ulster and Munster, planning plantations there of English landlords. In 1569, in response to major uprisings that year, Gilbert earned his notoriety with several brutal massacres, after which he lined the roads with the heads of those killed, being knighted by Sir Henry Sidney surrounded by piles of dead

⁵⁸ This story of welsh discovery of North America still had vitality into the 19th century, inspiring Missouri explorer John Evans to look for welsh speaking Native Americans in his early voyages, which in turn informed the expeditions of Lewis and Clark.

⁵⁹ Dee, above n 57, at 48.

⁶⁰ Ibid, at 49.

⁶¹ Ibid.

⁶² MacMillan, above n 56, at 63.

gallowglass warriors.⁶³ Royal enthusiasm for imperial expeditions faltered shortly after Gilbert was granted his patent, when the tons of gold Frobisher had brought back from islands off the coast of Canada turned out to be iron pyrite. It took five years for Gilbert to gather the funds for his own voyage. He had learnt something of how to profit from colonialism in Ireland, and his plans for North America were concerned with owning land and charging rent to the inhabitants.

It was not just Dee who made use of these myths of the ancient founding of Britain. These sorts of histories of the European races were quite common in this period, and had various uses.⁶⁴ The language of different races was also essential for explaining the conquest of colonies, and not just in newly discovered lands. In Ireland, as Anthony Carty demonstrates, the English and then British constructed the Irish as an inferior civilisation, just as various European nations would of other indigenous peoples.⁶⁵ Carty relies on Sir John Davies' *A Discovery of the True Causes Why Ireland was Never entirely Subdued* (1612), in which repeated reference is made to the Irish as barbarian and uncivilised, despite being Christian.⁶⁶

Ann Jones and Peter Stallybrass take things a step further, finding several arguments in 16th and 17th century political and legal writing that the Irish were Scythians.⁶⁷ The Scythians were an ancient Eurasian nomadic people. Edmund Spenser, author of the poem *The Faerie Queen* which similarly traces a genealogy for Elizabeth from the Trojan Brutus through King Arthur, wrote in his study and defence of English subjugation of Ireland that the Irish were

⁶³ See *Oxford Dictionary of National Biography* entry for Humphrey Gilbert.

⁶⁴ These texts are a focus of Foucault's lectures collected together in M Foucault, *Society Must be Defended* (London: Penguin, 2004). For example, he reads English history from 1066 into the 17th century as coded by a race war between Saxons and Normans.

⁶⁵ A Carty, *Was Ireland Conquered? International Law and the Irish Question* (London: Pluto Press, 1996)

⁶⁶ *Ibid*, pp 32-5.

⁶⁷ AR Jones and P Stallybrass, 'Dismantling Irena: The Sexualizing of Ireland in Early Modern England' in Andrew Parker et al (eds), *Nationalisms and Sexualities* (London: Routledge, 1992).

descended from the Scythians.⁶⁸ For Spenser, and the English more generally, this connection achieves two things: it denies the Irish ownership of their lands, as the Scythians were nomadic, and it demands the brutal suppression of the people, as the Scythians were very warlike. Civilisation must be brought to Ireland through conquest. Spenser, and other contemporary literary writers, also spent time praising and defending the brutality of English colonisers such as Gilbert.

On Gilbert specifically, Thomas Churchyard wrote of his killing ‘man, woman and child’, and of the necessity to ‘kill the men of war by famine’.⁶⁹ It is also in Churchyard that we find a record of Gilbert taking the heads of ‘all those, of whatever sort which were killed in the day’ and laying them ‘on the ground either side of the way leading into his own tent, so that none could come into his tent for any cause but commonly he must pass through a lane of heads’.⁷⁰ This brutality was required because the Irish were descended from such a warlike people, and it was the only way to impose civility upon them. Jones and Stallybrass draw connections with other contemporary literature which compared Ireland to a virgin suffering “the green sickness” – ‘that is, the pallor symptomatic of a wandering womb, supposedly needing to be fixed in place by intercourse’.⁷¹ This language of nomadic peoples needing subjugation and civilisation, found in political, historical and poetic writing, was equally useful for English expansion to the new world.

Wood also gives prominence to the conquest of Ireland as vital in her history of the transition from feudalism to capitalism. What distinguishes the Tudor conquest of Ireland from earlier Anglo-Irish conflicts is the form of control. Whilst military domination continued, extra-

⁶⁸ E Spenser, ‘A View of the Present State of Ireland’ in R Morris (ed) *The Works of Edmund Spenser* (London: Macmillan, 1899) p 625.

⁶⁹ Thomas Churchyard, ‘The Unquietness of Ireland’ as cited in Jones and Stallybrass, above n 67, at 161.

⁷⁰ Ibid.

⁷¹ Ibid, at 164.

economic force was used to implant economic domination, through enclosing land and establishing new relations of landlord and tenant, or as Wood puts it; ‘subdue the Irish by transforming their social property relations and introducing agrarian capitalism’.⁷² In this way Ireland became an extension of the English economy. This was ‘the chief legacy of late Elizabethan Ireland to English colonisation in the New World’.⁷³ In Humphrey Gilbert’s case, literally the same people were engaged in this colonisation of Ireland and North America.

Surveying the land was vital to the way that Gilbert envisaged controlling his lands in North America. The surveyor was born as a profession in the early decades of the 16th century, 1530, the same year as *Doctor and Student* was published, according to the *Dictionary of Land Surveyors and Local Mapmakers of Great Britain and Ireland*.⁷⁴ Also around this time the measurement of land changes from one of quality – yardlands – to the quantitative acres.⁷⁵ By the start of the 17th century the mathematical inventor Thomas Gunter had provided the surveyor with the definitive tool of the trade – Gunter’s chain. This twenty-two yard chain, the length of a cricket pitch, made up of one hundred links, is the unit of measurement which planned out the entire British Empire. A British settler colonial city, whether in the United States, South Africa or New Zealand, for example, is made up of streets 1½ chains wide, blocks that are 8 chains long by 5 wide, and public squares of 8 chains by 10 chains.⁷⁶ These practices are partners to the improvements in navigation and the calculation of longitude, all being part of a process of reading the world through a calculative rationality.

⁷² Wood, above n 5, at 154.

⁷³ S Ellis, *Ireland in the Age of the Tudors, 1447-1603* (London: Longman, 1998) as quoted in Jones and Stallybrass, above n 67, at 155.

⁷⁴ Sarah Bendle (ed), *Dictionary of Land Surveyors and Local Mapmakers of Great Britain and Ireland* (London: British Library, 1997).

⁷⁵ Pottage, above n 17, pp 365-6. See also A Linklater, *Measuring America* (London: Walker Books, 2002) pp 17-18.

⁷⁶ Linklater, above n 75, particularly pp 23-25.

In the Stuart period, charters for colonies in North America, in Newfoundland and Carolina, were granted under Charles I, but the English civil war interrupted this expansion. During the Commonwealth, although there were imperial conflicts and conquests in the Caribbean, far more attention was paid by Cromwell to the establishment of a united British Isles, largely due to the need to suppress royalists and Catholics in Scotland and Ireland. This he achieved by inflicting further slaughter on a huge scale, followed by population transfer, plague and famine, killing about a third of the population of Ireland.⁷⁷ It also led to the transfer of almost all land in Ireland to English, protestant, landlords. It is this that is distinctive about English colonialism; dominance was ultimately secured through the changing of property relations, most importantly by turning land into private property.

In Ireland, Gunter's chain was put to immediate use to secure property, territory, and the colony. After the conquest, massacres, population and property transfers, and after the plague had passed, Ireland was surveyed. The direct combination of surveying private property with practices of imperial territory is seen in 1656-58, when the surgeon general of Oliver Cromwell's army, William Petty, now best known as the "father of political economy",⁷⁸ led the surveying of the conquered and ravaged Ireland. Petty mass produced 1000 surveyors' chains and simple compasses, splitting the labour into a form of assembly line, and the work being done by 1000 soldiers and 40 clerks. The clerks noted down the information, giving the

⁷⁷ The classic account of Cromwell in Ireland is JP Pendergast, *The Cromwellian Settlement of Ireland* (London: PM Haverty, 1868), whose estimate is as high as 80%; a more recent account, Micheál Ó Siochrú, *God's Executioner: Oliver Cromwell and the Conquest of Ireland* (London: Faber & Faber, 2008) estimates at between 30-40%. The *Down Survey* itself gave a figure of 25% <http://downsurvey.tcd.ie/index.html>. This figure is debated in recent revisionist histories such as Tom Reilly, *Cromwell: An Honourable Enemy – The Untold Story of the Cromwellian Invasion of Ireland* (W&N 2000).

⁷⁸ For example Wood gives him this title, Wood, above n 5 at 113.

survey its name, the Down Survey. It was completed on time, under budget, and earned Petty £10,000 in fees plus 15000 acres of land. Before this time he had been worth £500.⁷⁹

As a doctor, Petty became famous for apparently reviving Anne Greene after she had been hung. It was this expertise that took him to Ireland as Cromwell's surgeon general.⁸⁰ Having seized the opportunity of conducting the survey, he dedicated his intellectual work from then on to questions of economics, or as he called it, *Political Arithmetic*.⁸¹ In this book, written around 1675 but not published until 1690, Petty puts forward his theories of a production line as worked out during the survey, but also a form of a labour theory of value, which argues that value is what is left after the land has been laboured upon to produce enough to survive. This is the rent of the land, the profit, and Petty argued strongly that land must be owned and managed in such a way to maximise this rent, something which he practiced over his considerable land holdings in south west Ireland.⁸² Petty's colonial experience in Ireland was vital for working out his theories of property and value, in a similar way to what John Locke would learn in North America.⁸³

After the Restoration, English colonisation of North America resumed apace. In 1663 Charles II granted a charter to a group of 8 confidants making them proprietors of a new colony, Carolina, encompassing what is now most of North Carolina, South Carolina, and Georgia.⁸⁴ Anthony Ashley Cooper, the Earl of Shaftesbury and later Charles II's Lord Chancellor,

⁷⁹ For an account of Petty's life, see A Linklater, *Owning the Earth* (London: Bloomsbury, 2013) Chapter 4. For Petty's works, see T Hutchinson (ed), *The Collected Works of Sir William Petty* (London: Routledge, 1997). The *Down Survey* can be viewed, with much commentary and interactivity, at the Trinity College Dublin Down Survey website - <http://downsurvey.tcd.ie/index.html>.

⁸⁰ For a brief account of the life of William Petty see his entry in *Oxford Dictionary of National Biography*. For a more detailed account see E Fitzmaurice *The Life of Sir William Petty* (London: J Murray, 1895).

⁸¹ T Hutchinson (ed), *The Collected Works of Sir William Petty* (London: Routledge, 1997).

⁸² On Petty in Ireland see F Harris, 'Ireland as a laboratory: the archive of Sir William Petty' in M Hunter (ed) *Archives of the Scientific Revolution* (Woodbridge: Boydall Press, 1998).

⁸³ Wood cites the work of Petty and Locke as the most obvious place to see the connection between English colonialism and English capitalism, Wood, above n 5, at 162.

⁸⁴ A digital version of the charter can be found at http://avalon.law.yale.edu/17th_century/nc01.asp (Yale Law Library).

managed the proprietorship. This charter, as with others issued by Charles II, contained what was known as the “Durham Clause”; a clause giving the right to ‘exercise, use, and enjoy’ the same privileges and powers as were held by ‘any Bishop of Durham, within the Bishopric or County Palatine of Durham’.⁸⁵ In practice, these landholdings granted directly from the king as freehold gave far more power and freedom than any traditional manorial lord or knight service *in capite*. They allowed for the proprietors to enfeeoff the land as ‘absolute lords’, swearing loyalty to the King.

With assistance from his personal secretary John Locke, Cooper planned the settlement of the colony. His success, in William Nelson’s judgement, led to ‘one of the most sophisticated legal orders on mainland North America’.⁸⁶ In 1669, Cooper and Locke wrote the Fundamental Constitutions of Carolina which contained many legal innovations. Several of these failed, such as the unicameral legislature, the provision for all legislation to expire after 100 years, the prohibition on fees for legal services, and the prohibition of writing commentary on the Fundamental Constitutions. What was a success was a property regime which encouraged large private farms, run by professional managers, worked by black slaves, producing excess which could be traded.⁸⁷

In communications between the Council in Carolina and the Proprietors in London, often written by Locke, there exists an historical record of what the Proprietors were trying to do in Carolina.⁸⁸ The colony had to be primarily defended against the threat from Spain to the south in the colony of Florida. Thus the Proprietors emphasised permanent agricultural

⁸⁵ MacMillan above n 56, at 97. The Prince-Bishops of Durham ruled the County Palatinate of Durham with local powers equivalent to that of the King, including taxation and separate Courts. Durham did not send representatives to parliament until 1654, and retained its Palatinate status until the 1836 Durham (County Palatinate) Act.

⁸⁶ WE Nelson, *The Common Law in Colonial America* (Oxford: OUP, vol 2, 2013) p 61.

⁸⁷ *Ibid*, pp 62-3.

⁸⁸ These letters are collected together in *The Shaftesbury Papers: Collection of the South Carolina Historical Society* (Columbia SC: University of South Carolina Press, 2000).

settlement as the rightful way of claiming ownership of the new world, both as the best legally and militarily defensible way of making the claim. Shaftesbury wrote that ‘a town in a healthy place will give more Reputation, Security and Advantage to us than ten times that number of people scattered about the country’.⁸⁹ The Constitutions also set out that initially land will be claimed by labour, but that once the government was established, this would no longer be possible, as property is to be only distributed by the Lord Proprietors.⁹⁰

Carolina produced good harvests and surplus food within a few years, but the farms in Carolina were unlike the family run farms of New England or the middle colonies, or even the tobacco plantations of the Chesapeake. These were not homes; they were run by professionals for trading. The merchants running Carolina also ran very profitable trades in guns, slaves and deerskin, trading guns to the Westoes to use in their wars with tribes allied to the Spanish in the south. The colonists of Carolina bought the captives of the Westoes and sold them to work in the Caribbean. The colony also exported an average of 50,000 deerskins.⁹¹

This sort of trading was not what Locke and Cooper had envisaged for their colony, and it is worth noting that in the *Two Treatises* Locke’s discussion of value, use and property is always in terms of agriculture, never in terms of trade or manufacturing. In Locke’s *Second Treatise on Government*, in chapter 5, *On Property*, we find the clearest linking of property and territory in ideological terms.⁹² Locke roots his justification for private property in self-ownership, that an individual owns themselves, and can then own things which they mix themselves with, through their labour. Locke’s historical scheme of development runs from basic labour title to property, through money allowing expansion, and the removing of any

⁸⁹ Letter from Lord Ashley to Sir Jo, Yeamans, 18th September 1671, in *ibid*, at 342.

⁹⁰ Fundamental Constitutions of Carolina, Articles 112-3.

⁹¹ Nelson above, n 86, p 64.

⁹² J Locke, *Two Treatises on Government* (Cambridge: CUP, Peter Laslett ed, 1960).

limits on what one can desire to own. People enlarge their possessions, and sell the surplus. All available land then becomes occupied and used and government is needed to solve the quarrels and insecurities that arise, to regulate and protect property. In this way private property forms the basis of sovereignty.

Although it is often overlooked, several modern readings of Locke emphasise the colonial context of his writing.⁹³ Each stage of historical development is defined by its contrast with the Amerindian. Locke was advocating both for enclosure at home and the colonisation of North America. He had first-hand knowledge of both practices through his work for the Earl of Shaftesbury. When Locke opens by declaring: ‘In the beginning all the world was as America’, this was not a metaphor.⁹⁴ Amerindians were both evidence for Locke’s theory and the subjects upon whom its implications were tested. The chapter on property is an important justification of colonial practice. Locke is not just dismissing the Indian as savage and uncivilised, using the ‘Indian-disparaging terms which ... [he] knew and favoured’.⁹⁵ The Indian is the subject and object of the argument, both prompting and proving Locke’s thesis.

The key point to take from Locke’s writing is that his theory of property is based in improvement. Unused land becomes property through its improvement; by enclosing, cultivating, and finally and crucially by trading. If it was simply about labour, then the Amerindian would have property, since they laboured on the land. Amerindians are clearly able to sustain themselves, but in Locke’s argument this is wasteful; ‘nature having furnished as liberally ... with the materials of Plenty ... yet for want of improving it by labour, have not

⁹³ See in particular: J Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: CUP, 1993); B Arneil, *John Locke and America* (Oxford: OUP, 1996); R Tuck, *The Rights of War and Peace* (Oxford: OUP, 2001).

⁹⁴ Locke, above n 92, at 301.

⁹⁵ M Kramer, *John Locke and the Origins of Private Property* (Cambridge: CUP, 1997) at 9.

one hundredth part the conveniences we enjoy'.⁹⁶ Locke contrasts wine with water, bread with acorns, and cloth with skins as examples of what improvement produces in England. Locke directly contrasts the 'spontaneous products of nature'⁹⁷ with things laboured upon; finding that of the total value '99/100 are wholly to be put on the account of labour'.⁹⁸ Tully rightly points out that Locke dismisses completely the skills and learning required for hunting, trapping, fishing, gathering and non-sedentary agriculture.⁹⁹ As such, as Wood argues, Locke's theory is better understood as one of exchange value rather than use value.

This becomes clearest when Locke introduces another contrast between nature and society; the unlimited desire and ability to accumulate brought in by money. This contrast, if we only read the American as a rhetorical comparison, has been seen as a contrast between bourgeois and proletarian motivation,¹⁰⁰ or the difference in motivation of individuals in market and non-market societies.¹⁰¹ Money allows for one to accumulate more than he can use. The pre-monetary Amerindians however cannot desire more: 'Where there is not something both lasting and scarce, and so valuable to be hoarded up, there Men will not be apt to enlarge their *Possessions of Land*'.¹⁰²

At this point it should be stressed that labour quickly disappears altogether from Locke's theory of property when he allows himself ownership over the work of those he employs: 'the turfs my servant has cut ... become my property'.¹⁰³ As with the Amerindians, it is not their

⁹⁶ Locke, above n 92, pp 296-7.

⁹⁷ Locke, above n 92, at 294, referring to 'wild Fruit, killed, caught, or tamed ... beasts'.

⁹⁸ Ibid, at 296. Locke finds European cultivation 1000 times more valuable than the wilds of America, at 298; and at 299 explains that Europe has no natural and common land, due to industriousness and money, whereas American common land lays waste. At 301 he explains that 100-thousand acres in inland America cannot be owned as there is no money to be drawn to it, and so it would return to nature.

⁹⁹ Tully, above n 93, at 156.

¹⁰⁰ For example, CB Macpherson, *The Political Theory of Possessive Individualism* (Clarendon Press 1962), pp 221-238.

¹⁰¹ Tully calls this a mistake, Tully, above n 93, pp 160-2, continuing his challenge to Macpherson and others.

¹⁰² Locke above n 92, p 301.

¹⁰³ Ibid, at 289.

failure to labour, but their failure to profit which leaves them without property. For Wood, this makes Locke ‘the first thinker to construct a systematic theory of property based on ... capitalist principles’.¹⁰⁴ Wood also draws the direct connection between Locke devising his theory of value in the context of Carolina and Petty his in Ireland.¹⁰⁵

Locke’s theory was of vital and immediate practical importance. The definition of property and the practice of property were both moving land away from a resource with overlapping use rights to one of exclusive ownership. In Carolina, the land had been granted in just such a way. In both cases, the argument that land owned in such a way was more valuable and more profitable leads to a more general claim of improvement and progress. Money’s crucial role in avoiding spoilage and allowing infinite accumulation leads to a claim that where there is no money, such as America, there is no property beyond natural, personal property. Furthermore, there is a moral wrong in merely accumulating in such a way as it can never allow for the improvement of humanity. When taken back to England, the vital innovation of Locke is that even where land is laboured on and cultivated, if it is not producing maximum value, then it is waste and can be expropriated. Locke’s theory, defined against the natural position of the Amerindian, denies both the natives of North America and the English commoner of any property rights. The invocation of waste, and God’s plan, makes the native and the commoner morally wrong.

It cannot be emphasised enough how large scale the changes brought by enclosure were. The Reformation saw a secularisation of land, and with it a quarter of all the land in England

¹⁰⁴ Wood, above n 5 at 113.

¹⁰⁵ Ibid, at 113.

changing ownership between 1536 and 1603.¹⁰⁶ By the time of parliamentary enclosure, the ownership of English land changed ‘at a revolutionary pace’.¹⁰⁷ Between 1750 and 1820, 6.8 million acres were enclosed, over a fifth of all the land in England, by Act of Parliament. Enclosure was not just a legal change, as Graham, following WG Hoskins, emphasises. Enclosure involved ‘burning and felling forests and woodland, draining fens, marshes and wetlands, dividing and fencing villages and open fields’.¹⁰⁸ In Hoskins term, the English landscape was literally man made.¹⁰⁹

The change in the relationship between people and land had more profound cultural effects too. The “culture of improvement” changed the relationship between the land and those who farmed it from one of subsistence to one of enterprise.¹¹⁰ Developments such as four course rotation or inventions such as the mechanised seed drill led to huge increases in the productivity of farming. But it also required the removal of ancient customary rights of commoners, such as peasants usufructuary rights over the crops they grew, or the right to graze animals on fallow fields, as well as a whole range of other common rights, such as pasture, turbary and estovers which changed from commons to individual rights.¹¹¹ Overall, Graham characterises this change as ‘the elimination of obligation and responsibility from law’, a vital part of the reconceptualization of the people-place relationship required in the capitalist economy.¹¹²

The idea of individual and absolute ownership of the land was fought for. It involved massive depopulation of the English countryside, the removal of the people who subsisted on this

¹⁰⁶ GR Elton, *The Tudor Constitution: Documents and Commentary* (Cambridge: CUP, 1982) pp 378-394.

¹⁰⁷ WG Hoskins, *The Making of the English Landscape* (London: Hodder & Stoughton, 1988) at 145.

¹⁰⁸ Graham, above n 3, at 63.

¹⁰⁹ Hoskins, above n 107.

¹¹⁰ The publication emblematic of this change is W Blith, *The English Improver Improved* (printed by John Wright 1653). For a good recent history of improvement, see P Slack, *The Invention of Improvement* (Oxford: OUP, 2015).

¹¹¹ Graham, above n 3 at 58-9.

¹¹² Ibid, at 60.

land, and its repopulation with sheep. Thomas Moore's exaggeration was very slight in *Utopia* when he describes sheep devouring men, villages and towns.¹¹³ This change was not something which happened peacefully. The crown resisted in various ways, as enclosure allowed for an increase in the power of landowners and merchants. Also of course the dispossessed made their voices heard, with events such as the Pilgrimage of Grace in 1536 and Kett's Rebellion in 1549. Enclosure, this 'revolution of the rich against the poor',¹¹⁴ did not go unopposed. The English Civil War, between parliamentary landowners and the King, was fought over ownership of the land. Anti-enclosure movements such as the Levellers and Diggers were the voice of the people in that war.¹¹⁵ Parliamentary enclosures from the 18th century saw the enclosure of millions of acres. In the meantime, the practices of private property had been developed in the English colonies. By the end of the century the tide had definitively turned, and the 18th century onwards saw the majority of enclosures licensed by statute. This struggle, of landed gentry to claim ownership of the land in opposition to both the commoners' rights and the monarchy, led directly to the English Civil War. At the same time, the same gentry were beginning to see the potential in English colonies, to grow richer and more powerful through colonialism as well as enclosure. The two practices happened together, in the same way, with the same people using the same techniques.

The Down Survey had been the first survey of its kind, covering the entirety of the island of Ireland. 200 years later, Ireland was again completely surveyed for the Ordnance Survey, again the first British territory to be comprehensively surveyed in this way. As Pottage notes in England, confidence in the accuracy of the Ordnance Survey fed into a faith in maps and

¹¹³ Thomas More, *Utopia* (Stephen Duncombe ed, Minor Compositions 2012) pp 43-44.

¹¹⁴ Polanyi, above n 7, at 37.

¹¹⁵ C Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (London: Penguin, New Edition, 1991).

surveys as evidence of property.¹¹⁶ But this form of understanding of the land was developed as a tool of governance of colonies, and as a military technique. The Ordnance Survey was a military operation, first developed in response to the Jacobite rising, and later drawing on the experience and skill of military engineers serving in the Napoleonic wars.¹¹⁷ In this way mapping as a territorial technique fed back into property in the 19th century.

5. Conclusion: Bringing it All Back Home

This article started with three histories: Wood on enclosure, Pottage on measuring land in England, and Bhandar on registering land in British colonies. The history I have told is built upon these histories, but pushes the argument in different directions. I share Wood's interest in enclosure as vital to understanding the origins of capitalism, but emphasise how important law is in those origins. Pottage gives the legal history of enclosure and property, and Bhandar emphasises the importance of colonialism in these developments. My argument has been that from the very start colonialism drove the development of practices of private property that are essential for enclosure and capitalism. In colonialism the techniques of abstraction of land were developed which were essential for the enclosure of land, and thus its transformation into property. The techniques of navigating, mapping, and surveying needed to understand the colonial world, and then to bring it under political control, were taken back and used in enclosing land in England. Colonialism was a necessary condition for private property to be possible, both in material practice and conceptually. By paying attention to how these things were made, a bit more sense can be made of how they work, and their possible ending. In conclusion I offer some insight from this history into contemporary legal theory, in terms of abstraction, jurisdiction, and international law.

¹¹⁶ Pottage above n 17, at 376.

¹¹⁷ WA Seymour, *A History of the Ordnance Survey* (London: Dawson, 1980).

The transformation of feudal landed property holding to capitalist private property ownership required a legal transformation of the relationship between people and things. While the history told here is for the most part concerned with material form of law, it is through abstraction, as Bhandar and Pottage argue, that ‘being and having’¹¹⁸ can become muddled together in the abstract legal form, with property becoming a qualification of an individual rather than a material possession. Bhandar argues that it is the turning of people into property through slavery that is the vital and unobserved part of this transformation, which allows ‘finance capital to decisively collapse real and intangible forms of value in the body of the slave’.¹¹⁹ In this article I have pushed this further back into history, finding attempts at abstraction, primarily through surveying, and also a racial characterisation of the Irish and native American, collaborating in dispossession. This demonstrates that even outside of the literal structures of colonisation and slavery, these logics have always been at work in private property, and continue to be. Contemporary globalised capital is rooted in colonialism and slavery, and the legal tools of globalised capitalism were formed to support colonialism and slavery.

This history is also a history of jurisdiction; jurisdiction being the articulation of law. Shaunnagh Dorsett and Shaun McVeigh separate territory from sovereignty and instead connect it up to jurisdiction and property.¹²⁰ Territory is the area within which a State has jurisdiction. Historically, this would be a medieval city state, and in England the area over which a Lord exercised authority separate from the crown.¹²¹ This made territorial authority co-existent with property. From this perspective, enclosure is a clash of jurisdictions, between the lord or other enclosing authority, and the commoners and their common rights to the land.

¹¹⁸ Bhandar, above n 24.

¹¹⁹ Ibid, at 218.

¹²⁰ S Dorsett & S McVeigh, *Jurisdiction* (London: Routledge, 2012).

¹²¹ Ibid, at 39.

While Dorsett and McVeigh do not explicitly make this comparison, they do see colonialism and indigenous rights as a clash of different jurisdictions, between the jurisdiction of the settler colonial state and the indigenous people.¹²² I would argue that the same situation can be seen historically in the use of law to transform the way property is owned in both enclosure and settler colonialism. Contemporary struggles for indigenous land rights cannot be understood separately from the history of settler colonialism, so too with material property concerns more generally.

Finally, this history has significance for international law. The history of international law is directly concerned with the legal history of colonialism, but it misses how much of that history is a history of property law. As research on the history of international law develops, and as the attention to space in legal scholarship also develops, these connections will become more apparent. The doctrinal restriction of the study of international law to inter-state legal relations hides both the effect of international law on the local and domestic and also the way that international legal doctrine is created at this smaller scale. Some recent scholarship has drawn attention to this, and the history told here can only support these developments.¹²³

It is in the early modern period that, as Bentham said, ‘property and law are born together’.¹²⁴ The measurement of land is made to have a material effect through law, at the same time as the law denies the effect of actual use and occupation. Law is vital in the organisation of

¹²² Ibid, at 98.

¹²³ A tentative spatial turn in international law is seen in research such as: D Bethlehem, ‘The End of Geography’, (2014) 25 *European Journal of International Law* 9; B D’Arcus, ‘Extraordinary Rendition, Law and the Spatial Architecture of Rights’ (2014) 13 *ACME* 79; C Landauer, ‘Regionalism, Geography, and the International Legal Imagination’, (2011) 11 *Chicago Journal of International Law* 557; Z Pearson, ‘Spaces of International Law’, (2008) 17 *Griffith Law Review* 489; T Mahmud, ‘Geography and International Law: Towards a Postcolonial Mapping’, (2007) 5 *Santa Clara Journal of International Law* 525; JC Carmalt, ‘Rights and Place: Using Geography in Human Rights Work’, (2007) 29 *Human Rights Quarterly* 68. See also the debate in (2014) 25 (1) *European Journal of International Law* 9. This can be situated as part of both a spatial turn in legal scholarship, and a growing interdisciplinary engagement between law and geography; see A Philippopoulos-Mihalopoulos, *Spatial Justice* (London: Routledge, 2014) and I Braverman et al., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford CA: Stanford UP, 2014).

¹²⁴ Jeremy Bentham, *Theory of Legislation* (London: Kegan Paul, 1931) at 113.

space, it creates property in the domestic, and it creates territory in the international, but the practices are the same. Property, like territory, is a technique for organising space which is presented as natural, essential, and always there but in practice needs constantly to be constituted, to be made and re-made, by law.